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Constitutional Law—New Element in Rate-fixing

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the jurisdiction of the court so far as the kind of relief which may be granted without offending due process is concerned.³⁵

Public Utilities—New Element in Rate-Fixing

For many years the Supreme Court had held that in determining reasonable rates upon the fair value of a utility's property used in public service, various factors must be taken into consideration, including reproduction value and original cost.³⁶ This remained the law until 1944 when the court virtually reversed itself, holding that the Constitution did not mandate consideration of any specific factor in rate-fixing, provided the rate fixed be just and reasonable.³⁷

The Public Service Commission Law, under which the Commission operates, requires that the rates of public utilities be based upon the value of the property actually used by the utility.³⁸ In setting utility rates, the first step is establishing the rate base; then the rate of return is set by looking at tradition and by examining the capital market; applying the rate of return to the rate base gives the amount of return; utility rates are set so as to yield this amount.³⁹ The initial task then is to determine the appropriate rate base. The conflict in this area comes from those who urge that "original cost" be used as the base and those who prefer that "reproduction cost" be the base. Until the present time, the Commission has steadfastly refused to use anything but "original cost" as their base in setting rates, attempting to keep the base low and making any adjustments which are deemed necessary in the rate of return.⁴⁰ The utilities, on the other hand, have maintained that using "original cost" basis does not allow for inflation in plant and equipment prices. Thus the utilities aim for a high base, hoping that the rate of return will remain commensurately high, allowing for the imposition of higher rates and yielding higher earnings to the utility.

In the instant case,⁴¹ the utility contended, and the Court of Appeals upheld

35. *Standard Oil Co. of Indiana v. Missouri*, 224 U. S. 270 (1912).

36. *Smyth v. Ames*, 169 U. S. 466 (1898).

37. *Federal Power Com'n. v. Hope Natural Gas Co.*, 320 U. S. 591 (1944).

38. N. Y. PUBLIC SERVICE COMMISSION LAW §97 The Commission shall, with due regard, among other things to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservation out of the income for surplus and contingencies, determine the just and reasonable rates.

39. Somers, *Cost of Money as the Determinant of Public Utility Rates*, 4 BUFFALO L. REV. 289, 309 (1955).

40. Case No. 15235 Re: New York Telephone Co., N. Y. P. S. C., Separate Print p. 48, 49 (1951).

41. *N. Y. Telephone Co. v. P. S. C.*, 309 N. Y. 569, 132 N. E. 2d 847 (1956). The telephone company brought an Article 78 proceeding (sections 1283 et seq. of the Civil Practice Act). The Appellate Division annulled the Commission's action and the Court of Appeals affirmed its decision.

its contention, that although there is no constitutional requirement that all relevant factors must be considered as long as the rate set is just and reasonable, yet the statutory requirement of determining value still exists.⁴² To determine value all factors must be taken into consideration, including reproduction costs less depreciation of the utility's physical plant. The company attempted to force the Commission to disregard the "original cost" base and to adopt this more favorable one or at least to adopt a more favorable rate of return. The Court deemed the Commission's refusal to admit such evidence improper and annulled its determinations.

It is questionable whether this decision will force the Commission to change its formula for setting rates. Though the evidence of reproduction costs must be admitted into evidence, it is still up to the Commission to decide the weight it will be given.

It has been suggested⁴³ that the whole method of rate determination is obsolete and outmoded and that the more practical and more easily applied "flight of capital" rule should be applied. When this plan is employed, there is no necessity of selecting a proper base; there is no rate of return set; the Commission would merely have to determine a level of earnings which would pay enough interest and give adequate return to equity securities to attract investors.

42. N. Y. PUBLIC SERVICE COMMISSION LAW §97.

43. Somers, *op. cit. supra*, note 39, at 311.